IN THE SUPREME COURT OF THE STATE OF DELAWARE

CORY HOLMES,	§	
	§	No. 694, 2009
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
STATE OF DELAWARE,	§	ID No. 0901020659
	§	
Plaintiff Below-Appellee.	§	
	§	

Submitted: September 29, 2010
Decided: December 9, 2010

Before **STEELE**, Chief Justice, **HOLLAND**, **BERGER**, **JACOBS**, and **RIDGELY**, Justices, constituting the Court *en Banc*.

O R D E R

This 9th day of December 2010, it appears to the Court that:

(1) Defendant-Below/Appellant, Cory J. Holmes, appeals from his Superior Court convictions for carjacking first degree, five counts of possession of a firearm during the commission of a felony ("PFDCF"), two counts of robbery first degree, burglary first degree, attempted robbery first degree, and possession of a deadly weapon by a person prohibited ("PDWPP"). Holmes raises two arguments on appeal. First, Holmes contends that his convictions must be reversed because the Superior Court admitted a newspaper article into evidence. Second, Holmes contends that the Superior Court erred in interrupting his counsel's closing

argument and in giving an instruction that mischaracterized Holmes' argument. We find no merit to Holmes' appeal and affirm.

(2) While driving his mother's car in New Castle, Resean Freeman saw a man that he recognized on the side of the road. It was snowing, and Freeman offered the man, Holmes, a ride. After Holmes indicated his preferred destination, Freeman testified that Holmes "pull[ed] a gun out and sa[id], 'Get the fuck out the car you bitch ass.'" Freeman testified that Holmes was wearing a "black skull cap, a black car jacket, dark blue pants." After Freeman exited the vehicle, Holmes drove away with the car. Later that evening, Holmes called Freeman and informed him of the location of the car. Approximately one week later, after seeing Holmes' picture in a newspaper article, Freeman identified his assailant as Holmes and notified the police.

(3) Later on that same evening that Freeman encountered Holmes, Madinah Elder and Harry Smith were at home and heard a knock on the door. Before opening the door, Smith asked, "who is it?", and a voice replied, "WPD." Smith testified that he then opened the door, and that the visitor pointed a gun at his waist, and exclaimed, "[w]ho the fuck is staying here?", and demanded money. First, Elder gave the man twenty dollars. Elder then gave the man an additional one hundred dollars. Elder testified that immediately thereafter, the man "clicked

the gun and said, 'Bitch, stop playing.'" Elder then retrieved another one hundred dollars and gave it to the man.

(4) When the man's attention was temporarily distracted, Elder ran out of the house. Subsequently, Smith fled the house too. Shortly thereafter, the police were notified of the incident. Elder and Smith testified that the man was wearing a black skull cap, a black Carhartt jacket, and dark pants.

(5) Police arrived at the scene. After following footprints in the snow that began at Elders' home, Officer Ryan Dorsey observed a man scaling the fence of a nearby home. After the man ignored Dorsey's demand to stop and attempted to scale another fence and kick in a door, Dorsey tasered the man, who turned out to be Holmes. When police arrested Holmes, he was wearing a white T-shirt. The police recovered a black jacket nearby, but never recovered a gun. Holmes was charged by indictment with carjacking first degree, five counts of PFDCF, two counts of robbery first degree, burglary first degree, attempted robbery first degree, PDWPP, and resisting arrest.

(6) As to the carjacking incident, Holmes testified that he did not have a gun and that he drove away in Freeman's car because he feared for his safety. Holmes also testified that, while he was in Freeman's vehicle, Freeman asked him to pay a debt related to a drug deal. Holmes then asked Freeman to take him to a nearby apartment complex to collect money from tenants, but when he attempted

to exit the vehicle to collect the money, Freeman told Holmes to instruct the tenants to bring the money to the car. Holmes further testified:

> So, I'm trying to negotiate, because really, I wasn't talking to nobody that'd never bring me nothing. So, you know, I just kind of got out and was saying, yo, I'm ready to go get it, and then he says that something's funny by the way I'm acting. And then he came out of his side, left the door open, and I ran from around his car and I jumped in and pulled off.

(7) As to the burglary and robbery, Holmes testified that he visited Elder's home and was invited inside to buy PCP from Elder. Holmes believed that Elder had provided approximately half the agreed upon amount of PCP; nevertheless, Elder and Smith demanded that Holmes pay for the full amount. Holmes "begged [Elder] to take [the PCP] back, [but] she wouldn't take it back." Holmes further testified: "Well, when they, they caved in on me, like, kind of like one coming – not like they was straight, but they was like coming slowly but surely close to me, so I inched out the door and ran out the door."

(8) During Holmes' Superior Court jury trial, Freeman testified that he contacted the police after he recognized his assailant in a newspaper story. During a sidebar conference, the State made the following statement:

> Right now I'm going to ask [that the article] be marked for identification and show it to him; ask him if that's the article, if that's what he read, if that's the article he saw later on. When you hear all the evidence, what's in here's almost – it's one hundred percent consistent with what the witness testified, and if it needs to be redacted then I'll redact it. My primary concern is the picture.

The article was marked as State's Exhibit A for identification. In full text, it provided:

> **Prints in snow lead to robbery suspect**
>
> Wilmington – When a man knocked on the door of a west-side home late Tuesday, the 26-year-old resident told police he asked, "Who is it?"
>
> The visitor identified himself as a Wilmington police officer, and the man opened the door of the home on the 200 block of Delamore Street.
>
> Rather than an officer, he found a masked intruder who pointed a gun at the resident's waist and demanded money, according to court records.
>
> The intruder, whom police later identified as 22-year-old Cory J. Holmes, was nabbed after officers followed fresh footprints in the snow and spotted his discarded jacket near another house he also tried to burglarize, police said.
>
> Holmes, of the 800 block of West Sixth Street, was charged with first-degree robbery, burglary, possession of a firearm during a felony, possession of a firearm by a person prohibited and impersonating a police officer. He is being held in the Young Correctional Institution in lieu of $138,000 bail.
>
> Wilmington police spokesman Master Sgt. Steven Barnes detailed the incident, saying a 31-year-old woman was on her bed in an upstairs room about 10:15 p.m. when a man knocked on the door, which her roommate answered.
>
> When the intruder came into the bedroom and demanded the money, she gave him $220 from her purse.
>
> According to court records, the man waved the gun at her, saying, "That's not enough. Give me something else."
>
> The woman ran out of the room and house, trying to flag down passing cars for help. A friend picked her up and drove her to

> the 100 block of Lancaster Avenue, where she found a patrol officer, police said.
>
> The officer and other units he called to the scene searched the area, following the footprints in the snow.
>
> Holmes, who had shed his jacket "so he could run faster," was cornered in the rear of a home in the 200 block of North Clayton Street, where he was trying to break in, according to the police, who added that they had to use a taser to subdue him as he resisted arrest.
>
> Holmes was treated at Wilmington Hospital for injuries from the effects of being tasered.
>
> A gun was not recovered, but police returned the $220 to the victim.
>
> According to court records, Holmes, who was found guilty of first-degree robbery and conspiracy in March 2003, was not permitted to have a gun.

(9) Holmes testified that he had read the newspaper article.[1] Thereafter, the State sought to introduce the entire article as an exhibit, arguing as follows:

> It's not being offered for truthfulness. First of all, it's in [Holmes'] statement. He makes reference to it. I cross examined him about it. He admitted that he had information about it, and that he actually read it. . . . We're not offering it for the truth or veracity, we're offering it to show a motive, intent, his state-of-mind with regard to his credibility and the issue of recent fabrication. . . . Now taking into consideration the nature of the defendant's statement where he gives at least three different versions in there, and all the inconsistencies and admitted lies, I think there is a strong argument that he used this article, which he admits that he saw, in an attempt to fabricate his story, either to the Detective or in court when he testified. Again, it's not being offered for its truth or veracity.

[1] When asked to review the article, Holmes replied, "I think I know it quite by heart after I had it forever."

The Superior Court overruled a defense objection to the admission of the text of article, explaining:

> So I've read the article, and most of what's said or I shouldn't say most of what's said – everything that's said in here has been the subject of testimony. There's been a witness who has testified to it and the jury may or may not believe that witness, and this, and the news story makes clear it's reporting a statement of a witness.

No instruction was given to the jury concerning the limited use of the article, even thought the prosecution did not offer it for truthfulness.

(10) During Holmes' closing argument, his counsel began to address the choice-of-evils defense. The State objected, and the Superior Court made the following statement to the jury:

> [T]here is a defense in our Criminal Code that is entitled Choice of Evils, and, I won't explain it to you because it's not in this case. We discussed it among counsel yesterday during our conference about instructions, . . . and I told [defense counsel] that if he wanted an instruction on that defense which has lots of elements to it, . . . that he should present a written request in writing for an instruction, which he declined to do. So that concept is simply not in this case, and the jury may not consider that the defendant was in some kind of bind, and just had to do what he did with regard to taking the car. That's a conceivable defense if a lot of technical things are proven, but it's not in this case.

(11) The jury found Holmes guilty of all charges, and the Superior Court sentenced him to forty-two years imprisonment, suspended after serving thirty-seven years. This appeal followed.

(12) Holmes argues that the Superior Court erred in admitting the newspaper article. "A trial judge's evidentiary rulings will not be set aside by this Court absent an abuse of discretion. . . . If we determine that the Superior Court abused its discretion, we then determine whether the error rises to the level of significant prejudice which would act to deny the defendant a fair trial."[2] "[T]he State . . . bears the burden of demonstrating, beyond a reasonable doubt, that the [error] . . . was a harmless error."[3] "An error in admitting evidence is harmless only when the properly admitted evidence, taken alone, is sufficient to support a conviction."[4] But an error, defect, irregularity or variance that affects a substantial right of a defendant shall not be disregarded as harmless error.[5]

(13) Delaware Rule of Evidence 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." "If a statement is introduced for a purpose other than its truth, however, it may be admissible under some circumstances. If it is admitted for another purpose, that purpose must be relevant to an issue of the trial."[6]

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[2] *Manna v. State*, 945 A.2d 1149, 1153 (Del. 2008).
[3] *Dawson v. State*, 608 A.2d 1201, 1204–05 (Del. 1992).
[4] *Seward v. State*, 723 A.2d 365, 373 n.27 (Del. 1999).
[5] *See Burroughs v. State*, 988 A.2d 445, 449 (Del. 2010) (citing *Taylor v. State*, 685 A.2d 349, 350 (Del. 1996)).
[6] *Johnson v. State*, 587 A.2d 444, 447 (Del. 1991).

(14) Here, the State did not offer the newspaper article to prove the truth of its content. Rather, the State argued that the article's content was relevant because Holmes testified that he "kn[e]w it quite by heart," and an inference could be drawn that Holmes "used th[e] article . . . in an attempt to fabricate his story, either to the Detective or in court when he testified."

(15) Even though the prosecutor did not offer the article for the truth of its content, the Superior Court admitted it without a limiting instruction. As we recently explained, a limiting instruction should have accompanied the admission of this kind of background information:

> [I]f the trial court concludes that the probative value of the [evidence] is not substantially outweighed by its unfair prejudice to the defendant and decides to admit [the evidence], the admission . . . must be accompanied by a limiting instruction to the jury. The jury must be contemporaneously advised that the [evidence is] not being admitted for the truth of [its] content . . . . Giving a limiting instruction regarding the purpose for which the testimony is received further averts any prejudice to the defendant.[7]

We have previously recognized that the admission of such evidence may amount to harmless error. In *Johnson v. State*,[8] we concluded that the trial court erred in admitting a confidential informant's out-of-court statement.[9] But, we also concluded that the error was harmless.[10] In *Sanabria v. State*,[11] we distinguished

[7] *Sanabria v. State*, 974 A.2d 107, 116 (Del. 2009) (citations omitted).
[8] 587 A.2d 444 (Del. 1991).
[9] *See Johnson*, 587 A.2d at 451.
[10] *See id.* at 451–52.

Johnson and determined that the trial judge in *Sanabria* had erred by failing to provide a limiting instruction and in admitting testimony in violation of the Confrontation Clause of the Sixth Amendment.[12] In *Sanabria*, we found that the error was not harmless, because the "out-of-court statements were not merely cumulative evidence," but rather "likely were a principal factor in [the] conviction."[13] Here, in contrast, the newspaper article did not include any information of which the jury was not otherwise fully informed through admissible evidence introduced at the trial. On the facts of this case, the "out-of-court statements were [] merely cumulative evidence," and "were [not] a principal factor in [Holmes'] conviction[s]."[14] Because the other, admissible evidence against Holmes was sufficient to sustain his convictions, we conclude that the error in admitting the newspaper article without a limiting instruction was harmless beyond a reasonable doubt.[15]

(16) Holmes next argues that the Superior Court erred in refusing to allow him to argue a choice-of-evils defense. We review a refusal to instruct the jury on a defense theory *de novo* to determine (1) whether the "defense" was available as a

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[11] 974 A.2d 107 (Del. 2009)
[12] *See Sanabria*, 974 A.2d at 116–20.
[13] *See id.* at 120.
[14] *See id.*
[15] *See Van Arsdall v. State*, 524 A.2d 3, 10 (Del. 1987).

matter of law, and, (2) if so, whether the evidence presented at trial was sufficient to support the instruction.[16]

(17) Title 11, section 463 of the Delaware Code provides for a choice-of-evils defense under the following circumstances (emphasis added):

> [C]onduct which would otherwise constitute an offense is justifiable when it is necessary as an emergency measure to avoid an *imminent public or private injury* which is about to occur by reason of a situation occasioned or *developed through no fault of the defendant*, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

(18) The Superior Court concluded that Holmes was not entitled to a choice-of-evils instruction. Regarding his encounter with Freeman, Holmes testified that Freeman "came out of his side, left the door open, and I ran from around his car and I jumped in and pulled off." As to his encounter with Elders and Smith, Holmes testified: "Well, when they, they caved in on me, like, kind of like one coming – not like they was straight, but they was like coming slowly but surely close to me, so I inched out the door and ran out the door."

(19) Even if we fully accept Holmes' testimony as true, Holmes still has failed to demonstrate that he acted to "avoid an imminent public or private

[16] *Wright v. State*, 953 A.2d 144, 148–49 (Del. 2008).

injury."[17] Further, even if we assumed that he acted to avoid imminent injury, Holmes has not demonstrated that the "situation occasioned or developed through no fault" of his own,[18] given his explanation for finding himself in these situations: in the first incident, he claimed he was paying a drug-deal debt; and in the second, he claimed he was obtaining PCP. The Superior Court did not err in concluding that Holmes was not entitled to a choice-of-evils instruction.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED**.

BY THE COURT:
/s/Henry dupont Ridgely
Justice

[17] *See* 11 *Del. C.* § 463.
[18] *See id.*